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In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

ALBERT EDWARD GLINES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision, statute, and regulations involved	2
Statement	6
Summary of argument	12
Argument:	
I. The requirement that servicemen obtain the approval of the base commander before distributing petitions on base does not violate the First Amendment	15
A. Military commanders may prohibit the distribution on military bases of petitions that present a clear danger to military loyalty, discipline, or morale, or that materially interfere with the accomplishment of a military mission	16
1. *Greer* v. *Spock* establishes that distribution of certain materials on military bases may be prohibited	16
2. *Greer* applies to military personnel as well as to civilians on military bases	24
B. The requirement that servicemen obtain the approval of their commanders before distributing petitions on base is constitutional	28

Argument—Continued Page

1. The Court has permitted systems of prior approval to be used concerning speech in military bases 28
2. Prior submission and approval rules are constitutional under principles long accepted for speech i.. general 30

II. The requirement that servicemen obtain the approval of the base commander before distributing petitions to members of Congress on base does not violate 10 U.S.C. 1034 36

A. 10 U.S.C. 1034 does not limit the authority of the military departments to regulate the distribution of petitions on military bases 37

B. The prior approval requirement is "necessary to the security of the United States" and thus valid even if 10 U.S.C. 1034 applies to the distribution of petitions on military bases 42

Conclusion 48

CITATIONS

Cases:

Adderley v. *Florida*, 385 U.S. 39 ..... 21, 27, 28
Allen v. *Monger*, 583 F.2d 438, petition for cert. pending *sub. nom. Brown* v. *Allen*, No. 78-1005 ..... 9, 39

Cases—Continued Page

Bell v. *Wolfish*, No. 77-1829 (May 14, 1979) 35
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 37
Brotherhood of Railroad Trainmen v. *Virginia*, 377 U.S. 1 25
Burns v. *Wilson*, 346 U.S. 137 ..... 18, 44
Cameron v. *Johnson*, 390 U.S. 611 22
Carlson v. *Schlesinger*, 511 F.2d 1327 ..... 22, 24, 30
Cook v. *Arentzen*, 582 F.2d 870 11
Cortright v. *Resor*, 447 F.2d 245, cert. denied, 405 U.S. 965 12
Covington v. *Anderson*, 487 F.2d 660 12
Cox v. *Louisiana*, 379 U.S. 559 21
CSC v. *National Association of Letter Carriers*, 413 U.S. 548 ..... 22, 26
Culver v. *Secretary of the Air Force*, 559 F.2d 622 ..... 20, 46
Dash v. *Commanding General*, 307 F. Supp. 849, aff'd, 429 F.2d 427, cert. denied, 401 U.S. 981 ..... 6, 24, 30
Department of the Air Force v. *Rose*, 425 U.S. 352 18
Diliberti v. *Brown*, 583 F.2d 950 12
Elrod v. *Burns*, 427 U.S. 347 26
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 37
FCC v. *Pacifica Foundation*, 438 U.S. 726 31
Freedman v. *Maryland*, 380 U.S. 51 32
Grayned v. *City of Rockford*, 408 U.S. 104 ..... 21, 22, 32
Greer v. *Spock*, 424 U.S. 828 ..... *passim*

Cases—Continued — Page

Gusik v. *Schilder*, 340 U.S. 128 12
Hague v. *CIO*, 307 U.S. 496 27
Hudgens v. *NLRB*, 424 U.S. 507 27
Huff v. *Secretary of the Navy*, 575 F.2d 907, cert. granted, No. 78-599 (Mar. 19, 1979) 9
Kelley v. *Johnson*, 425 U.S. 238 26
Lehman v. *City of Shaker Heights*, 418 U.S. 298 28
Marsh v. *Alabama*, 326 U.S. 501 27
Mindes v. *Seaman*, 453 F.2d 197 12
Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 11
Near v. *Minnesota*, 283 U.S. 697 31
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 33
New York Times Co. v. *United States*, 403 U.S. 713 31
Noland v. *Irby*, 341 F. Supp. 818, aff'd *sub. nom. Noland* v. *Desobry*, No. 71-1661 (6th Cir. Apr. 24, 1972) cert. denied, 409 U.S. 934 30
Ohio Bureau of Employment Services v. *Hodory*, 431 U.S. 471 12
Orloff v. *Willoughby*, 345 U.S. 83 .....11, 18, 46
Parker v. *Levy*, 417 U.S. 733 .....18, 19, 21-22, 23, 26, 44, 46
Procunier v. *Martinez*, 416 U.S. 396..... 35
Sampson v. *Murray*, 415 U.S. 61 11
Schenck v. *United States*, 249 U.S. 47..... 22
Schlesinger v. *Councilman*, 420 U.S. 738.. 12, 18, 26
Schneider v. *Laird*, 453 F.2d 345, cert. denied, 407 U.S. 914 .....6, 22, 24, 30

Cases—Continued — Page

Secretary of the Navy v. *Avrech*, 418 U.S. 676 44
Seepe v. *Department of the Navy*, 518 F.2d 760 12
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 29
Talley v. *California*, 362 U.S. 60 25
Thomas v. *Collins*, 323 U.S. 516 25
Times Film Corp. v. *Chicago*, 365 U.S. 43 ..... 32, 34
United Mine Workers v. *Illinois State Bar Association*, 389 U.S. 217 25
United States v. *Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 19
United States v. *Mowat*, 582 F.2d 1194.... 20
United States v. *Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 ..... 21, 22
United States v. *Testan*, 424 U.S. 392 11
United States ex rel. Toth v. *Quarles*, 350 U.S. 11 ..... 18, 23
Yahr v. *Reson*, 431 F.2d 690, cert. denied, 401 U.S. 982 30
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 30

Constitution, treaty, statutes and regulations:

United States Constitution, First Amendment 2, 8, 9, 13, 17, 44
Treaty of Mutual Cooperation and Security with Japan, Article XVI, 11 U.S.T. 1664, T.I.A.S. No. 4509 20
5 U.S.C. 7102 40

Constitution, treaty, statutes and regulations—Continued — Page

10 U.S.C. 934 ..... 18, 21, 22, 43, 44, 47
10 U.S.C. 1034 ..... *passim*
18 U.S.C. 2387 47
18 U.S.C. 2387(a)(1) 19
Air Force Regulations:
30-1(19) 4, 6, 7, 20
35-15(3)(a) 5
35-15(3)(a)(1) 7, 20
35-15(3)(a)(2) 7, 15, 21
35-15(3)(a)(4) 7
Army Regulation 210-10, ¶ 5-5(c) 15
Department of Defense Directive (1969):
1325.6 ..... 2, 6
1325.6 ¶ II 47
1325.6 ¶ III(A)(1) 7
1325.6 ¶ III(A)(3) 7
Fleet Marine Force Pacific Order (FMFO) 5370.3 (1974) 6, 15
Section 3(b) 20, 31, 34
Section 4(a) 15
Section 4(b)(3) 47
Section 4(c) 17
Navy Regulations (1948):
Article 1248 38
Article 1249 38

Miscellaneous:
97 Cong. Rec. (1951):
pp. 3775-3776 39

Miscellaneous—Continued — Page

p. 3776 ..... 38, 39
pp. 3776-3777 38
p. 3877 39
p. 3883 39
Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1.. 27
Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233 27

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 586 F.2d 675. The opinion of the district court (Pet. App. 17a-27a) is reported at 401 F. Supp. 127.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1978. The petition for a writ of certiorari was filed on December 20, 1978, and was granted on March 19, 1979 (A. 40). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Air Force regulations that require military personnel to obtain approval before circulating petitions on military bases violate the First Amendment.

2. Whether these regulations are invalid under 10 U.S.C. 1034 as applied to petitions addressed to members of Congress.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 10 U.S.C. 1034 provides:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

3. Department of Defense Directive 1325.6 (1969) provides in relevant part:

I. PURPOSE AND APPLICABILITY

This Directive provides general guidance governing the handling of dissident activities by members on active duty of the Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.

II. POLICY

It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

III. SPECIFIC GUIDELINES

The following Guidelines relate to principal activities in this area which the Armed Forces have encountered:

A. *Possession and Distribution of Printed Materials*

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchange and military libraries. In the case of distribution of publications through other than official out-

lets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited.

2. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute.

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

4. *a.* Air Force Regulation (AFR) 30-1(9) provides in pertinent part:

Right of Petition Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition to the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander.

b. AFR 35-15(3)(a) provides:

Possession and Distribution of Written or Printed Materials:

(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.

(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be impounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Im-

pounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

(5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues.

STATEMENT

1. Each of the military departments has adopted regulations that require servicemen who wish to distribute petitions or other written materials on a military base to obtain the prior approval of their commanding officers. See, *e.g.*, FMFO 5370.3 (Navy regulation); AFR 30-1(9) (Air Force regulation).[1] These regulations are derived from Department of Defense (DOD) Directive 1325.6 (1969). The Directive provides that "a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loy-

[1] The Army regulations are discussed in *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972). See also *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971). The Navy regulations are the subject of *Secretary of the Navy* v. *Huff*, No. 78-599, which is to be argued in tandem with this case.

alty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission." DOD Dir. 1325.6 ¶ III(A)(1). The policy of the Directive is to preserve the "service member's right of expression * * * to the maximum extent possible, consistent with good order and discipline and the national security." *Id.* at ¶ II. Thus, the Directive counsels that the "fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited." *Id.* at ¶ III(A)(3).

Air Force regulations provide that "the public solicitation or collection of signatures on a petition by any person within an Air Force facility * * * is prohibited unless first authorized by the commander" and that "[n]o member of the Air Force will distribute or post any printed or written material * * * without permission of the commander or his designee * * *." AFR 30-1(9), 35-15(3)(a)(1). The commander may withhold approval for the distribution of such material if he determines that "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result." AFR 35-15(3)(a)(2). The commander may not prohibit distribution of any material "solely on the ground that the material is critical of Government policies or officials." AFR 35-15(3)(a)(4).

2. In 1974, while respondent was on active duty for training as a captain in the Air Force Reserve,

he drafted petitions to the Secretary of Defense and to several Members of Congress opposing military hair length standards (Pet. App. 1a-2a). Respondent was informed by his superiors at Travis Air Force Base that the on-base circulation of petitions was permitted only with the approval of the base commander. Respondent then circulated the petitions off base (*id.* at 3a).

In April 1974, while respondent was at Anderson Air Force Base in Guam, he gave the petitions to an Air Force sergeant who gathered eight signatures on the petitions. He did not seek permission to circulate the petitions. Because of the unauthorized circulation of the petitions, respondent was removed from active duty status and charged with failure to meet the professional standards of a reserve officer. He declined to submit evidence on his behalf. The charges were sustained, and respondent was reassigned to the standby reserve (Pet. App. 4a). Respondent then brought this action seeking declaratory and injunctive relief, reinstatement and back pay, alleging that the prior approval regulations violate 10 U.S.C. 1034 and the First Amendment (A. 15).

3. The district court granted respondent's motion for summary judgment. The court held that the regulations, "[o]n their face, * * * suffer from considerable overbreadth" (Pet. App. 24a) and "impose[] a considerable burden upon the free exercise of the First Amendment right of petition for redress of grievances" (*id.* at 25a). Finding that "the military need to control petitioning arises only in extraordinary circumstances (such as in a combat zone * * * or in an induction center * * *)," the court concluded that the regulations violate the First Amendment (*id.* at 26a). The court entered a judgment declaring the prior approval requirement of the regulations to be unconstitutional, enjoining the Air Force from enforcing the regulations against respondent, and ordering respondent's reinstatement to active duty with $22,032.91 in back pay.

4. *a.* The court of appeals affirmed in part and vacated and remanded in part. Relying on its decision in *Allen* v. *Monger*, 583 F.2d 438 (9th Cir. 1978), petition for cert. pending *sub nom. Brown* v. *Allen*, No. 78-1005, and on *Huff* v. *Secretary of the Navy*, 575 F.2d 907 (D.C. Cir. 1978), cert. granted, No. 78-599 (Mar. 19, 1979), the court held that application of the prior approval requirement to the distribution of petitions to Members of Congress on military facilities is invalid under 10 U.S.C. 1034.[2] This statute prohibits any person from "restrict[ing] any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." The court concluded that "the government has not shown that such restraints are actually necessary to the national security outside a combat zone" (Pet. App. 8a).

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[2] *Allen* held that Navy regulations requiring the prior approval of commanding officers before petitions could be distributed on Navy ships are invalid under 10 U.S.C. 1034.

b. 10 U.S.C. 1034 concerns only petitions to Members of Congress, and one of respondent's petitions was addressed to the Secretary of Defense. The court of appeals therefore reached the question whether the prior approval requirement of the regulations is constitutional (Pet. App. 9a). The court stated that the requirement is "obviously a prior restraint on speech, and prior restraints have the heaviest burden of justification under the First Amendment" (*id.* at 11a). The court concluded that there is no sufficient justification for the challenged regulations. Although it recognized the special disciplinary needs of the military, the court held that the military interests could be satisfied through alternative means, such as "[p]unishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty periods, and protection from pressure by superiors who are seeking signatures * * *" (*id.* at 11a-12a). The court stated that, although the regulations may be constitutionally valid in a combat zone, they are facially unconstitutional because of their overbroad application to protected activity (*id.* at 13a).

c. Despite holding the regulations unconstitutional, the court of appeals observed that monetary claims against the government for amounts in excess of $10,000 are within the exclusive jurisdiction of the Court of Claims; it therefore vacated the award of back pay (Pet. App. 14a-16a). The court remanded the case to the district court with instructions to dismiss the claim for back pay without prejudice or to transfer it to the Court of Claims (*id.* at 16a).[3]

[3] The court's disposition of the case raises a number of problems that we have not presented as questions for resolution by this Court. It may be, for example, that a single claim for relief should not be split in this fashion, with damages aspects sent to the Court of Claims and equitable aspects retained by the district court. At least one court of appeals has held that, when a serviceman brings suit in a district court seeking more than $10,000 in back pay and equitable relief, the entire case should be transferred to the Court of Claims. *Cook* v. *Arentzen*, 582 F.2d 870 (4th Cir. 1978). This will reduce the duplication of judicial effort that is required by the procedure adopted here and will reduce the chance of inconsistent adjudications. Because this bifurcation of the claim is not a defect in this Court's jurisdiction, however, we do not pursue it further. Cf. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 279 (1977). If this Court should affirm the judgment that the regulations are unconstitutional or conflict with 10 U.S.C. 1034, however, the government may raise in the Court of Claims a number of questions concerning the scope of its authority over the case, including the question whether the doctrine of sovereign immunity permits the award of back pay in a situation such as the instant one. Cf. *United States* v. *Testan*, 424 U.S. 392 (1976). No statute explicitly authorizes the award of back pay to servicemen removed from active duty in response to their defiance of regulations later determined to be unauthorized.

There are a number of other problems with the case itself. The direction that respondent be reinstated from the inactive reserve to duty with the active reserve—that the Air Force be compelled to have a disobedient captain in its ranks—may well be inconsistent with the principles of *Sampson* v. *Murray*, 415 U.S. 61 (1974) (courts ordinarily should not enter injunctions requiring a discharged federal employee to be reinstated), and *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (courts must be careful to respect military personnel decisions, even those initially based on improper considera-

SUMMARY OF ARGUMENT

I

The military regulation is not unconstitutional. In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Court upheld the constitutionality of an Army regulation that required the "prior written approval" of the base commander before any person could distribute "any publication" on base. *Id.* at 831. The Court concluded (*id.* at 840) that

> [t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

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tions). Cf. *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971) (certain military personnel matters are not justiciable); *Covington* v. *Anderson*, 487 F.2d 660 (9th Cir. 1973); *Cortright* v. *Resor*, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). There is also some doubt that respondent exhausted his military remedies; he did not apply to the appropriate Corrections Board, which had the authority to order him retransferred to active duty. Courts have held that this failure bars judicial review. See, *e.g.*, *Diliberti* v. *Brown*, 583 F.2d 950 (7th Cir. 1978); *Seepe* v. *Department of the Navy*, 518 F.2d 760 (6th Cir. 1975). Cf. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975); *Gusik* v. *Schilder*, 340 U.S. 128 (1950). But some of these problems were not raised in the court of appeals and, in any event, they are not strictly jurisdictional. We have, therefore, elected not to raise them here so that questions concerning the validity of the regulations can be put to rest. Cf. *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 479-480 (1977).

The regulations at issue here are identical in purpose and effect to the regulations challenged in *Greer* v. *Spock* and should be upheld for the same reasons.

The court of appeals distinguished *Greer* on the ground that it involved only restrictions applied to civilians rather than restrictions on the speech of servicemen. The court of appeals also reasoned that *Greer* involved speech for "political purposes" rather than "free speech" (Pet. App. 13a). These distinctions are insubstantial. Political speech is free speech; speech about political matters lies at the core of the First Amendment. *Greer* cannot properly be distinguished on the ground that it involved "only" speech at the core of the constitutional concern. And the observation that this case involves servicemen rather than civilians does not assist the court of appeals. The military's authority over the speech and conduct of servicemen is necessarily far broader than its authority over the speech of civilians. The court of appeals' distinction also overlooks the rationale of *Greer*: that a military base is not a "public forum" for purposes of circulating petitions or making political speeches. No case in this Court has held that a place must be available as a public forum for employees but not for guests, and there is thus no basis for holding that a military base is a "public forum" for servicemen but not for civilians.

II

If the Court agrees with our contention that the regulation is consistent with the Constitution, then

it must reverse the judgment of the court of appeals insofar as that judgment pertains to petitions addressed to persons other than Members of Congress. The court of appeals concluded (Pet. App. 8a), in addition, that the regulation is invalid under 10 U.S.C. 1034, which provides that "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." This aspect of the decision of the court of appeals is incorrect for two reasons.

First, the language and history of 10 U.S.C. 1034 indicate that this statute is concerned only with private communications from servicemen to Members of Congress and not with the public circulation of group petitions at military facilities. Because the challenged regulation does not affect any serviceman's personal right to engage in private communications with Members of Congress, there is no inconsistency between the statute and the regulations.

Second, the requirement that servicemen submit petitions to their commanders for approval prior to on-base distribution is essential to forestall the distribution of improper materials *before* they accomplish substantial harm to military discipline, loyalty or morale or adversely effect accomplishment of military missions. The regulation is therefore necessary to the protection of the national security and valid under 10 U.S.C. 1034.

ARGUMENT

I

THE REQUIREMENT THAT SERVICEMEN OBTAIN THE APPROVAL OF THE BASE COMMANDER BEFORE DISTRIBUTING PETITIONS ON BASE DOES NOT VIOLATE THE FIRST AMENDMENT

This case involves two related constitutional issues. The first is whether the military departments may prohibit the distribution of petitions on military bases that would create a "clear danger to the loyalty, discipline, or morale of members of the [base command], or material interference with the accomplishment of a military mission * * *." AFR 35-15(3)(a)(2). See Army Reg. 210-10 ¶ 5-5(c); FMFO 5370.3 § 4(a).[4] The second is whether, in order to

[4] The Army regulation governing the distribution of petitions is essentially identical to the Air Force regulation involved in this case. See *Greer* v. *Spock*, 424 U.S. 828, 831 n.2 (1976). The Navy regulation at issue in *Secretary of the Navy* v. *Huff*, No. 78-599, is more detailed. It allows distribution to be prohibited by the commander where distribution would (FMFO 5370.3 § 4(a)):

> (1) Materially interfere with the safety, operation, command, or control of his unit, or the assigned duties of particular members of the command; or
>
> (2) Present a clear danger to the loyalty, discipline, morale, or safety to personnel of his command; or
>
> (3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates insubordination, disloyalty, mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter; or
>
> (4) Involve the planning or perpetration of an unlawful act or acts.

enforce such a prohibition, the military departments may require servicemen to submit petitions for review before distribution. It is necessary to undertake both inquiries because respondent never submitted his petition for review, and the court of appeals concluded that the prior submission rule is the unconstitutional feature of the regulation. Yet the prior submission rule obviously cannot stand unless circulation of some of the petitions so submitted properly could be prohibited. We therefore first discuss the scope of the authority of the military departments to prohibit circulation of petitions on military bases.

A. Military Commanders May Prohibit The Distribution On Military Bases Of Petitions That Present A Clear Danger To Military Loyalty, Discipline, Or Morale, Or That Materially Interfere With The Accomplishment Of A Military Mission

1. Greer v. Spock *establishes that distribution of certain materials on military bases may be prohibited*

In *Greer* v. *Spock*, 424 U.S. 828 (1976), the Court upheld the constitutionality of an Army regulation that required the "prior written approval" of the base commander before any person could distribute "any publication" on base. *Id.* at 831. That regulation instructed the base commander to deny permission to distribute written materials if " 'the dissemination * * * presents a clear danger to the loyalty, discipline, or morale of troops at [the] installation * * *.' " *Id.* at 831 n.2. The Court dismissed the contention that this restraint on the distribution of

written materials at military facilities violates the First Amendment (*id.* at 840; footnote omitted):[5]

> The only publications that a military commander may disapprove are those that he finds constitute "a clear danger to [military] loyalty, discipline, or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical —even unfairly critical—of government policies or officials * * *." There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

See also *id.* at 841 (Burger, C.J., concurring); *id.* at 848-849 (Powell, J., concurring).

The regulations at issue here are identical in purpose and effect to the regulation upheld in *Greer* v. *Spock*. Both regulations require the approval of the base commander before petitions may be distributed on base, and both prohibit the distribution of written materials that present a "clear danger to the loyalty, discipline or morale" of affected servicemen. See also FMFO 5370.3 § 4(a)(2); note 4, *supra*. Moreover, the considerations that underlay the Court's decision in *Greer* v. *Spock* also are present here.

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[5] Like respondents in this case, the respondents in *Spock* contended that the military regulations created an unconstitutional system of prior restraint and established impermissibly broad standards for deciding what materials may not be distributed. See Brief for Respondents in *Greer* v. *Spock*, No. 74-848, at 36-43.

The military's interest in preserving the loyalty, morale, and discipline of troops is undeniably important.[6] See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. The military is a "specialized community," *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953), with a need to "insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). The nation's security depends on the preservation of military preparedness, loyalty and discipline, for " 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " *Parker* v. *Levy*, 417 U.S. 733, 743 (1974), quoting *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955).

Accordingly, the Court has recognized that " 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty * * *.' " *Parker* v. *Levy*, *supra*, 417 U.S. at 744, quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). In particular,

[6] Congress has made it a punishable offense for any serviceman to engage in "disorders and neglects to the prejudice of good order and discipline * * *." 10 U.S.C. 934. "Within [the military], the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior. The importance of these considerations to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 368 (1976).

the extent of a serviceman's right to engage in political activities on a military base is limited by "[t]he fundamental necessity for obedience," *Parker* v. *Levy*, *supra*, 417 U.S. at 758, and the " 'overriding demands of discipline and duty.' " *Id.* at 744.

> The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

Id. at 759, quoting *United States* v. *Gray*, 20 U.S.C. M.A. 63, 42 C.M.R. 255 (1970). These considerations are no less appropriate here than in *Greer*.

And here, as in *Greer*, the regulations' interference with the right of expression is quite limited and is narrowly constrained to protect the government's substantial interests. The regulations do not prohibit or otherwise interfere with a serviceman's personal communications to Members of Congress or other government officials. The regulations do not restrict a serviceman's freedom to engage in oral discussions of political topics or other issues either off base or on base.[7] The regulations do not affect the distribu-

[7] 18 U.S.C. 2387(a)(1), however, makes it unlawful for any person, "with intent to interfere with, impair or influence the loyalty, morale, or discipline of the military or naval forces of the United States" to advise, counsel or urge "insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States * * *."

tion of petitions off base in the United States by servicemen not in uniform.[8] The regulation addresses only the distribution of written materials and the "public solicitation or collection of signatures" on a petition at military facilities. AFR 30-1(9), 35-15(3)(a)(1). The activities dealt with by the regulation thus are a small subset of the types of expression in which a serviceman might engage. And there is "no generalized constitutional right to make political speeches or distribute leaflets" on a military base, *Greer* v. *Spock*, *supra*, 424 U.S. at 838, because the purpose of a military facility is to provide for the national defense, "not to provide a public forum." *Ibid.* See also *United States* v. *Mowat*, 582 F.2d 1194, 1205 (9th Cir. 1978).

[8] The Navy regulation challenged in *Secretary of the Navy* v. *Huff*, *supra*, is even more limited in effect. It applies only to the distribution of written materials at an installation by a serviceman while "on duty or in uniform * * *." FMFO 5370.3 § 3(b).

The Navy and Air Force regulations also apply to the off base distribution of petitions "anywhere within a foreign country irrespective of uniform or duty status." *Ibid.*; see AFR 30-1(9). This portion of the Navy regulation was upheld by the district court in *Secretary of the Navy* v. *Huff* (78-599 Pet. App. 48a-50a) as applied to a United States base in Japan. The court concluded that the restriction was an appropriate means of enforcing Article XVI of the Treaty of Mutual Cooperation and Security with Japan, 11 U.S.T. 1664, T.I.A.S. No. 4509, which prohibits servicemen from engaging in political activity in Japan (78-599 Pet. App. 49a-50a). Accord, *Culver* v. *Secretary of the Air Force*, 559 F.2d 622, 632 (D.C. Cir. 1977). This portion of the judgment in *Huff* was not appealed and is thus no longer at issue in that case. The application of the challenged Air Force regulation to off base foreign distribution was not challenged by respondent.

The regulation is limited not only in its scope but also in its substantive effect. The grounds on which distribution may be disapproved by base commanders are narrowly tailored to reflect precisely the substantial interests the government seeks to protect. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-112 (1972). By prohibiting the distribution of petitions that create a "clear danger to [military] loyalty, discipline, or morale * * * or material interference to the accomplishment of a military mission," AFR 35-15(3)(a)(2), the regulations "'preserve the property under [military] control for the use to which it is lawfully dedicated.'" *Greer* v. *Spock*, *supra*, 424 U.S. at 836, quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966). See also *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 120-121; *Cox* v. *Louisiana*, 379 U.S. 559, 565 (1965). The terms employed in the regulations are sufficiently distinct, in light of military custom and usage, to be understood and fairly applied.[9] *Parker* v. *Levy*, *supra*,

[9] In *Parker* v. *Levy* the Court determined that the provision in 10 U.S.C. 934 that proscribes "all disorders and neglects to the prejudice of good order and discipline" is not unconstitutionally vague or overbroad. 417 U.S. at 752-762. The Court noted that because of "the reasons which differentiate military society from civilian society, * * * Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed * * *." *Id.* at 756. The Court also emphasized that the meaning of restrictions to protect discipline and good order has gained content from "official interpretation by authoritative military sources [as well as] by less formalized custom and usage." 417 U.S. at 754. For example, in *United States* v. *Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972), the Court of Military Appeals, in upholding a court martial con-

417 U.S. at 752-757. See *Grayned* v. *City of Rockford, supra,* 408 U.S. at 112; *Cameron* v. *Johnson,* 390 U.S. 611 (1968). The restriction on the distribution of petitions involves " 'conduct and not merely speech,' " and it applies to a " 'range of easily identifiable and constitutionally proscribable * * * conduct.' " [10] *Parker* v. *Levy, supra,* 417 U.S. at 760, quoting *CSC* v. *National Association of Letter Carriers,* 413 U.S. 548, 580-581 (1973). The scope of potential prohibition is not facially invalid merely because "there may lurk at the fringes" conduct that

viction under 10 U.S.C. 934 for the distribution of a petition that injured "good order and discipline," stated that because of "our national reluctance to inhibit free expression * * * the connection between the statements or publications involved and their effect on military discipline [must] be closely examined." 45 C.M.R. at 344. The court concluded that the question in such a case is whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger" (*ibid.,* quoting *Schenck* v. *United States,* 249 U.S. 47, 52 (1919) (Holmes, J.)) of injuring the military interest in order and discipline or "the effectiveness of response to command" (*ibid.,* quoting *United States* v. *Gray, supra*).

[10] Because respondent did not submit his petition to the Air Force for approval prior to distribution (Pet. App. 18a-19a), he can not contend that the substantive limitations on distribution are unconstitutional as applied to his petitions. See *Greer* v. *Spock, supra,* 424 U.S. at 840. Respondent's claim is (and must be) that the regulations are invalid as applied to every conceivable petition. See also note 11, *infra.*

The Navy conceded that its regulation was improperly applied to restrict distribution of certain petitions in *Huff* (78-599 Pet. App. 3a). The regulations were quite plainly applied properly, however, in *Carlson* v. *Schlesinger,* 511 F.2d 1327 (D.C. Cir. 1975); *Schneider* v. *Laird,* 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972); and other of the petitions involved in both *Huff* and *Allen* v. *Monger, supra.*

is not properly subject to restraint.[11] *Parker* v. *Levy, supra,* 417 U.S. at 760.

[11] See note 9, *supra.* The court of appeals erred in stating that the regulations are overbroad because they allow the commander "to prohibit distribution partly because the 'material is critical of Government policies or officials.' AFR 35-15(3)(a)(4)" (Pet. App. 13a). This portion of the regulation is in fact designed to ensure that any decision to prohibit distribution is based on considerations *other than* the petition's criticism of government policy. See *Greer* v. *Spock, supra,* 424 U.S. at 840.

The court of appeals also erred in suggesting that the "regulations are valid, if at all, only in the limited setting of a combat zone" (Pet. App. 13a). To be sure, what may constitute a "clear danger" to discipline and loyalty or what may threaten a military mission may vary from circumstance to circumstance. A commander may view even minor disruptions in discipline as dangerous to his command in a combat situation, while greater lapses may be tolerable (*i.e.,* not clearly dangerous) at other times and places. But the military interest that is defined by the regulation—avoiding a "clear danger" to military discipline, morale and loyalty—is of equivalent importance in both situations, even though the acts necessary to present the danger may be different. The military must be prepared for immediate action. See *United States ex rel. Toth* v. *Quarles, supra,* 350 U.S. at 17. History teaches vividly that the readiness of the armed forces to respond instantly and without internal division when the need occasions is of the utmost importance to our national security whether we are in a state of perceived peace or in a state of declared war. See also pages 44-45, *infra.*

Because this case involves a challenge to the regulations on their faces, the Court must sustain them if *anything* that might have been written and circulated in Guam in 1974—or in a combat-ready missile base in North Dakota in 1980—could possibly present a clear danger to military readiness. It is not hard to understand the need for readiness at a missile base whose function calls for instantaneous response (if necessary); that alone is enough to show the court of appeals' error.

The need for readiness is demonstrated in an affidavit sub-

2. Greer *applies to military personnel as well as to civilians on military bases*

The court of appeals concluded that *Greer* is not controlling here. The court reasoned that *Greer* v. *Spock* involved only the right of civilians to "come on the base * * * for political purposes," and this case

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mitted by the commander of the Iwakuni Air Station in *Secretary of the Navy* v. *Huff, supra* (78-599 Pet. App. 29a). The base took part in combat and relief activities conducted throughout Southeast Asia in 1972 and 1975. The affidavit notes (*ibid.*):

> At any time, the Wing may again be called upon to deploy under similar circumstances on a moment's notice. In this eventuality, the highest degree of loyalty, discipline, and morale will be necessary for the successful completion of the mission.
>
> Personnel who are constantly prepared for deployment into combat or a crisis situation must at all times have the same strict discipline and high morale as would troops in actual combat situations. * * * The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. * * * These traits must be inherent in each Marine before he goes into combat and not a learning process reserved for the actual battlefield. Individual or collective efforts by those who would attempt, consciously or otherwise, to undermine good order, discipline, loyalty, and morale, cannot be tolerated.

Recognizing the scope of the military need for preparedness, discipline and morale, other courts have upheld the military prior approval regulations as applied to a Vietnam combat base, *Carlson* v. *Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975), a weapons testing ground in Utah, *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972), and an Army base in South Carolina, *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971).

presents the different question of the right of military personnel to be free of "direct restraints upon * * * free speech" (Pet. App. 13a). The distinction offered by the court of appeals lacks any substance.[12]

The fact that this case concerns servicemen rather than civilians does not undermine the government's substantial interest in prohibiting the distribution of petitions that present a clear danger to military dis-

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[12] In *Secretary of the Navy* v. *Huff, supra*, the District of Columbia Circuit reasoned that *Greer* v. *Spock* concerned the distribution of pamphlets and leaflets rather than petitions, and thus may not apply to restraints on petitioning activities (78-599 Pet. App. 20a). This proposed distinction also is unsupportable, for several reasons.

First, the regulation upheld in *Greer* v. *Spock* applied to the distributions of "handbills, flyers, circulars, pamphlets or other writings" as well as "any publication." 424 U.S. at 831. It was thus plainly broad enough to encompass petitions. Second, a threat to military order and preparedness can be couched in the form of a petition as well as in the form of leaflets or other writings. There is thus no basis for differentiating the military interest on the basis of the form of the document being distributed. Third, the regulation was applied in *Spock* to prohibit the presidential campaigning of a private citizen—an activity that is unquestionably as integral to the political process as the petitions involved in this case. If a base is not a public forum for one purpose, it is not a public forum for the other. Finally, the Court has noted in *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 222 (1967), and *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945), that the right to assemble peaceably and petition for a redress of grievances is intimately connected with the right of free speech and is subject to regulation under the same standards. The analysis of the constitutionality of the challenged regulations is thus not affected by the fact that petitions, rather than political leaflets, are at issue here. See *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 5-7 (1964); *Talley* v. *California*, 362 U.S. 60 (1960).

cipline and preparedness. To the contrary, the authority of the military departments to limit conduct at military facilities that erodes discipline and order is even more firmly based as to servicemen than as to civilians. *E.g.*, *Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 757. This is true not only because of the special requirements of discipline and duty in military life, *e.g.*, *Parker* v. *Levy*, *supra*, 417 U.S. at 743, 744, but also because servicemen are analogous to government employees and thus may be subjected to reasonable restrictions on free expression in order to promote effective government. See *CSC* v. *National Association of Letter Carriers*, 413 U.S. 548, 564-565 (1973); cf. *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Kelley* v. *Johnson*, 425 U.S. 238, 245 (1976). Moreover, the vital governmental interest recognized in *Greer* v. *Spock*—to avert threats to military loyalty, discipline and morale (424 U.S. at 840)—can be injured by the actions of military personnel as well as by civilians. There is thus no basis for interpreting that decision to permit regulation only of civilians, and not of servicemen.

It is not possible to distinguish *Greer* v. *Spock* on the theory that it concerned only the right to "come on the base * * * for political purposes" rather than "the right of free speech" (Pet. App. 13a). The right of free speech was, of course, directly at issue in *Greer* v. *Spock*. See 424 U.S. at 836-840. The rationale for the Court's holding in *Greer* was that a military base is not a "public forum," *i.e.*, not a place for open speech and public debate. One reason why a military base is not a public forum is the need to

remove the military from politics, which is one form of free speech. But this hardly exhausts the reasons why a base is not a public forum,[13] and it certainly does not support the court of appeals' distinction between political speech and "free speech."

In *Greer*, as in numerous related cases (*e.g.*, *Grayned* v. *City of Rockford*, *supra*; *Adderley* v. *Florida*, *supra*; *Cox* v. *Louisiana*, *supra*), it was necessary to determine whether a government could declare a particular publicly owned facility off-limits to activity that substantially interferes with the purposes of the facility. In determining in such cases that regulation may "preserve the property under its control for the use to which it is lawfully dedicated," *Adderley* v. *Florida*, *supra*, 385 U.S. at 47, the Court has not limited its decisions to persons who enter the facility as guests rather than as employees. For example, it is inconceivable that the Court would have reached a different result in *Grayned* v. *City of Rockford* if the demonstrators who were disturbing classroom activities at school were teachers rather than "students, their family members and friends." 408 U.S. at 105. It is similarly inconceivable that the

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[13] The special need for military order and discipline is the principal reason why military bases are not public forums, even though public parks and "company towns" are available as forums. Compare *Greer* v. *Spock*, *supra*, 424 U.S. at 836-838, with *Hague* v. *CIO*, 307 U.S. 496, 515-516 (1939) (Roberts, J., concurring). Compare *Marsh* v. *Alabama*, 326 U.S. 501 (1946), with *Hudgens* v. *NLRB*, 424 U.S. 507 (1976). See generally Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233; Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1.

constitutional analysis in *Adderley* v. *Florida* would have been any different if the persons demonstrating on jail grounds against racially invidious practices were jail personnel rather than students from a nearby college. 385 U.S. at 40. There is thus no basis for limiting the decision in *Greer* to civilians "who come on the base * * * for political purposes."

B. The Requirement That Servicemen Obtain The Approval Of Their Commanders Before Distributing Petitions On Base Is Constitutional

1. *The Court has permitted systems of prior approval to be used concerning speech in military bases*

As we have outlined above, the Court concluded in *Greer* v. *Spock* that military bases are not public forums. It follows from this that all on-base circulation of petitions could be forbidden. If the military services choose to relax this rule—to give servicemen greater freedom of expression than the Constitution requires—they surely can require advance submission of proposed petitions to ensure that their content is consistent with the purpose for which the liberty is granted. And military commanders can use this advance screening to select some petitions for proscription. If, as the Court held in *Lenman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), ordinary political speech can be excluded (after advance inspection) from a transit system that is not a public forum, then speech dangerous to the military can be excluded (after advance inspection) from a base that is not a public forum.

It may be, however, that *Greer* stands for the proposition that a military base is a public forum for some purposes but not for others. In that event, the prior approval requirement must be assessed under the rules that apply to limited-access forums. There are many systems of prior approval for the use of different public forums. For example, it may be necessary to obtain a permit to hold a rally in a park, to obtain a license for a parade, or to obtain a booking to play in a theatre owned by the public. None of these facilities is open to everyone at all times. All involve prior scrutiny of the speech in question. The Court has said that such systems of scrutiny may be used when "the exercise of such authority [is] bounded by precise and clear standards." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975).

The regulations in question here provide the necessary "precise and clear" standards for the use of the base as a public forum. They spell out quite clearly the duty of the base commander: he is to approve the distribution *unless* the material would create a "clear danger to the loyalty, discipline, or morale" of servicemen. If there is such a danger, and the commander exercises his authority to prohibit the distribution, he must notify higher authority immediately. The commander is under instruction that he cannot ban distribution "solely on the ground that the material is critical of Government policies or officials." This guidance is enough, we submit, to sustain the regulation even under the

standards that have been applied to prior approval rules for public parks—places in which the freedom to speak traditionally has been much greater than that afforded on military bases.

Indeed, *Greer* v. *Spock* itself demonstrates the validity of the prior approval rule. Respondents in *Greer* contended that the prior approval requirement of the regulations for Fort Dix created an unconstitutional prior restraint. The Court rejected that contention and upheld the regulations, which required the "prior written approval" of the base commander before "any publication, including newspaper, magazines, handbills, flyers, circulars, pamphlets or other writings" could be distributed on base. 424 U.S. at 831 & n.2, 840. Similar regulations for other bases have been sustained by other federal courts. See, *e.g.*, *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971); *Yahr* v. *Resor*, 431 F.2d 690 (4th Cir. 1970), cert. denied, 401 U.S. 982 (1971); *Noland* v. *Irby*, 341 F. Supp. 818 (W.D. Ky. 1971), aff'd *sub nom. Noland* v. *Desobry*, No. 71-1661 (6th Cir. Apr. 24, 1972), cert. denied, 409 U.S. 934 (1972); *Schneider* v. *Laird*, 453 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972); *Carlson* v. *Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975).

2. *Prior submission and approval rules are constitutional under principles long accepted for speech in general*

The discussion above is enough to sustain the regulations. But if we are wrong in this submission, then

the Court must consider whether the regulation is, as the court of appeals said, "obviously a prior restraint on speech" (Pet. App. 11a). We submit that it is not. In only the most narrow sense is speech restrained by the prior approval requirement. The regulation does not, as in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), or *Near* v. *Minnesota*, 283 U.S. 697 (1931), wholly suppress the communication of any particular information. Instead, the right of every serviceman to express his views on any subject either orally on the base or in writing by individual letters or distributing petitions off base is unaffected by this regulation.[14] The prior approval requirement acts to limit the "time, place and manner" of public communications.[15] The Court has held that such restrictions are permissible where —as here—they are designed to protect substantial governmental interests. See, *e.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748-750 (1978) (restrictions on broadcast of indecent speech); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 & n.18 (1976) (plurality opinion) (zoning limitation on the location of "adult" film theatres is supported by the city's interests in commercial planning and is

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[14] The special restrictions on the distribution of petitions off base in foreign countries are not at issue in this case or in *Secretary of the Navy* v. *Huff*, *supra*. See note 8, *supra*.

[15] This is emphasized in the Navy regulation challenged in *Secretary of the Navy* v. *Huff*, *supra*. That regulation requires prior approval for on-base distributions only if the petition (or other writing) is to be distributed during duty hours or in work areas. FMFO 5370.3 § 3(b).

not invalid as a prior restraint on speech); *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 118-119.

Moreover, even to the extent that the prior approval requirement affects petitioning activities, it can be expected to occasion only a temporary delay in the distribution of most materials. The prior approval requirement serves only as a temporary screening device to identify improper materials and prohibit their on-base distribution before they endanger the loyalty, discipline and preparedness of the command. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Cf. *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (approving prior review and licensing of motion pictures); *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961) (same).[16]

The court of appeals was mistaken in concluding that "less restrictive alternatives" are available to protect the government's substantial interests (Pet. App. 12a) and that the government therefore cannot satisfy the "heav[y] burden of justification" for the prior approval requirement (*id.* at 11a). The alternatives identified by the court were "[p]unishment after the fact for genuinely disruptive petitions, limitation of circulation to certain areas and to off-duty

[16] Respondent has not contended that the prior approval requirement fails to afford a prompt determination of a request for on-base distribution. See *Freedman* v. *Maryland*, *supra*, 380 U.S. at 58-59 (film licensing). The issue is not properly presented here because respondent did not apply for approval before distributing his petition (see Pet. App. 3a-4a). Nor has this issue been raised in *Secretary of the Navy* v. *Huff*, *supra*.

periods, and protection from pressure by superiors who are seeking signatures * * *" (*id.* at 11a-12a). Although these options are less "restrictive," the court of appeals offered no argument showing that they would be adequate to avoid or "mitigate the effects" of an improper distribution.[17] *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562 (1976).

Punishment after the fact would not safeguard the national interest that underlies the military regulation. The injury to national security occurs when the improper material is distributed and discipline and morale are lowered, or the military mission is threatened. See note 11, *supra*. We do not dispute that, in some circumstances, the prospect of punishment after the fact would discourage servicemen from engaging in improper activity. In at least two circumstances, however, a system of post hoc sanctions would be inadequate unless supplemented by a requirement of prior approval: (1) where a serviceman innocently but incorrectly concludes, without review by the base commander, that the materials are proper for distribution; and (2) where a serviceman determines, despite threatened post-distribution sanctions, to distribute improper materials. The prior approval requirement responds to both of these concerns: (1) it permits the military commander to identify and prohibit distribution of improper materials before any

[17] Punishment after the fact for the exhibition of obscene movies in a theatre obviously is an alternative to a pre-exhibition licensing requirement. The Court nonetheless has upheld licensing of movies. See page 32, *supra*.

distribution occurs; and (2) it permits immediate action to curtail distribution where approval has been denied or has not been sought. By thus preventing the distribution of improper materials before they can accomplish substantial harm, the prior approval requirement is necessary to the accomplishment of the objectives of the regulation. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Cf. *Times Film Corp.* v. *Chicago*, *supra*, 365 U.S. at 49-50.

Similarly, limiting the prior approval requirement to distributions in work areas or during duty hours (Pet. App. 11a) would be less restrictive, but it would not provide adequate protection for the government's substantial interests. Military effectiveness may be severely impaired whether on-base distributions occur in work areas on duty or in the barracks after hours.[18] In either situation, the Constitution does not "disable[] a military commander" from requiring servicemen to submit petitions for approval prior to distribution on base and "disapprov[ing the circulation of petitions] that he finds constitute 'a clear danger to [military] loyalty, discipline, or morale' * * *." *Greer* v. *Spock*, *supra*, 424 U.S. at 840.

[18] The Navy regulations challenged in *Secretary of the Navy* v. *Huff*, *supra*, permit on-base distribution without prior approval in non-work areas during off-duty hours. FMFO 5730.3 § 3(b). The regulation requires, however, that prior approval be obtained before any distribution is made on a naval vessel or aircraft. *Ibid.*

The Army regulation is similar to the Air Force regulation in requiring prior approval for any on-base distribution, regardless of base area or duty status. See *Greer* v. *Spock*, *supra*, 424 U.S. at 831.

Off-base distributions are presumably less dangerous to military loyalty, discipline or morale for the simple reason that what occurs off base lacks any imprimatur of official sanction and is less likely to create any general or widespread disruption among base personnel. The regulations thus generally do not require servicemen out of uniform to obtain prior approval before circulating petitions off base in the United States.

In determining the permissibility of official restraints on the circulation of written materials in federal facilities such as jails and prisons, the Court has observed that the restriction should be upheld if it "further[s] an important or substantial governmental interest unrelated to the suppression of expression [and is] no greater than necessary or essential to the protection of the particular governmental interest involved." *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974). See also *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 29-31 (pretrial detainees). The challenged regulations satisfy these criteria. The military regulations are designed to preserve the ability of the armed forces to perform their essential functions and not to suppress speech. *Greer* v. *Spock*, *supra*, 424 U.S. at 840. The prior approval requirement is no broader than necessary to accomplish the objectives of the regulation: it is inapplicable to individual written communications, to off base distributions of petitions out of uniform, and to oral communications either on or off base.

II

THE REQUIREMENT THAT SERVICEMEN OBTAIN THE APPROVAL OF THE BASE COMMANDER BEFORE DISTRIBUTING PETITIONS TO MEMBERS OF CONGRESS ON BASE DOES NOT VIOLATE 10 U.S.C. 1034

If the Court agrees with our contention that the regulation is consistent with the Constitution, then it must reverse the judgment of the court of appeals insofar as that judgment pertains to petitions addressed to persons other than Members of Congress. Petitions addressed to Members of Congress require resolution of the meaning of 10 U.S.C. 1034, which provides that "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." The court of appeals held that the requirement that servicemen obtain approval before distributing petitions on base is not "actually necessary to the national security outside of a combat zone" (Pet. App. 8a). The court concluded that the challenged regulation is therefore invalid under 10 U.S.C. 1034.[19] This aspect of the decision of the court of appeals is incorrect for two reasons.

[19] The court did not specify whether it was holding the regulation to be facially invalid under 10 U.S.C. 1034 or simply invalid as applied to respondent's conduct on Guam (see Pet. App. 8a). But it affirmed a declaratory judgment that the entire regulation is "null, void and inoperative" (A. 37). In *Secretary of the Navy* v. *Huff*, *supra*, the District of Columbia Circuit held the prior approval requirement invalid under 10 U.S.C. 1034 as applied to servicemen stationed at the United States Naval Air Base in Iwakuni, Japan (78-599 Pet. App. 16a). In *Brown* v. *Allen*, *supra*, the Ninth Circuit held that 10 U.S.C. 1034 barred application of the prior approval requirement to servicemen on board Navy ships (78-1005 Pet. App. 2a-4a, 11a-12a).

A. 10 U.S.C. 1034 Does Not Limit The Authority Of The Military Departments To Regulate The Distribution Of Petitions On Military Bases

The language and history of 10 U.S.C. 1034 indicate that this statute is concerned only with private communications from servicemen to Members of Congress and not with the public circulation of group petitions. Because the challenged regulation does not affect any serviceman's personal right to engage in private communications with Members of Congress, there is no inconsistency between the statute and the regulation.

"The starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). The language of 10 U.S.C. 1034 does not mention joint petitioning or other collective activity. It deals instead with the action of an individual "member of an armed force in communicating with a member of Congress * * *." The absence of any reference to group petitioning in this statute is not simply fortuitous; it reflects the limited objective that Congress sought to achieve.

10 U.S.C. 1034 was enacted in response to an incident involving a constituent of Rep. Byrnes of Wisconsin. In 1951 Rep. Byrnes learned that a sailor on board a Navy ship had been threatened with a court martial if he wrote a letter to his congressman without sending it through the military chain of command. 97 Cong. Rec. 3776 (1951). At that time, Articles 1248 and 1249 of Navy Regulations (1948) provided that "any letter from a member of the naval service to Congress or to a Congressman which affects the Naval Establishment should be sent through official channels." 97 Cong. Rec. 3776 (1951). The Navy informed Rep. Byrnes that "[w]henever correspondence addressed to a Congressman is sent via the Secretary of the Navy, it is, as a matter of policy, forwarded promptly." *Ibid.* According to the Navy, the purpose of the requirement was not to prevent the delivery of letters to Congressmen but to keep the Navy "advised as to all matters relating to the Naval Establishment." *Ibid.*

Rep. Byrnes proposed the bill that became 10 U.S.C. 1034 as a means to remove the Navy's restriction on a serviceman's individual communications with Members of Congress.[20] In proposing this legislation, he agreed with Rep. Vinson that its purpose was "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." 97 Cong. Rec. 3776 (1951). As Congressman Vinson summarized on the House floor, the objective of Section 1034 is (*id.* at 3877)

> to let every man in the armed services have the privilege of writing his Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret matter.

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[20] The Army and the Air Force did not require servicemen to send letters to Members of Congress through official channels. 97 Cong. Rec. 3776-3777 (1951).

The original version of the amendment provided:

> No person shall be inducted for training and service under this title into any branch of the Armed Forces which restricts or limits the rights of its members to communicate directly with Members of Congress unless such communication is in violation of regulations necessary to the security and safety of the Armed Forces.

97 Cong. Rec. 3775-3776 (1951). Rep. Vinson pointed out "that there is no induction in the Navy." *Id.* at 3776. The next day Reps. Byrnes and Vinson therefore introduced a substitute version of the amendment, corrected to remove its drafting defect. The new amendment, as enacted, read (*id.* at 3883):

> No member of the Armed Forces shall be restricted or prevented from communicating directly or indirectly with any Member or Members of Congress concerning any subject unless such communication is in violation of law, or in violation of regulations necessary to the security and safety of the United States.

In *Allen* v. *Monger, supra*, 583 F.2d at 441, the Ninth Circuit suggested that the phrase "communicate directly or indirectly" in the original law indicates that group petitions should be included within the term "communication." The phrase "directly or indirectly" was deleted as surplusage in a 1956 codification of this section. 583 F.2d at 441. In determining whether the term "communication" refers to the action on an individual serviceman, or to group activity, however, the phrase "directly or indirectly" is unimportant. If a group petition is a "communication" by a serviceman within the meaning of the statute, it would seem a "direct" rather than "indirect" form of expression.

Throughout the legislative history, the focus of Congress' concern was on removing official restraints on the personal communications of individual servicemen to Members of Congress. Group action—as in distributing petitions on military facilities—is never mentioned even obliquely. The absence of any reference to group petitioning in the language or legislative history of this statute is especially significant because, in its enactment of analogous legislation, Congress has been careful to refer to both individual and collective activity. For example, 5 U.S.C. 7102 provides that "[t]he right of [civil service] employees, individually or collectively, to petition Congress or a Member of Congress * * * may not be interfered with or denied."

As Judge Tamm concluded in his dissent in *Secretary of the Navy* v. *Huff*, *supra*, "[a]n objective reading of the legislative history demonstrates that the *sole* purpose in enacting 10 U.S.C. § 1034 was to ensure that an *individual* member of the military could, at any time, write to his senators or representative without being required to have the communication proceed through command channels" (78-599 Pet. App. 24a; emphasis in original).[21] This

[21] In *Huff* the District of Columbia Circuit conceded that the legislative history discusses only the right of individual servicemen to send letter to Members of Congress (78-599 Pet. App. 11a-12a). The court concluded, however, that "there is no indication that this is the outer limit of the communication which Congress sought to protect in passing this legislation" (*id.* at 12a). This analysis is difficult to credit. In determining the "outer limit," or proper meaning, of words employed in a statute, it is always appropriate to be guided by clear evidence of the limited concern that motivated its enactment. The legislative history of 10 U.S.C. 1034 establishes that the concern of Congress is accurately captured by the words of a statute that deals with the action of "a member" of the service in "communicating" with Congress, not with the action of "members" in circulating petitions to the public on a base.

In determining that the "outer limit" of the statute extends beyond its language to joint petitioning, the court of appeals in *Huff* relied solely on a Department of Defense directive (78-599 Pet. App. 12a). The Directive, however, casts no light on this issue. It states only that a serviceman "may petition or present any grievance to any member of Congress" (*ibid.*). The court found significance in the use of the word "petition" in the Directive, concluding that this implies group activity (*ibid.*). But the Department of Defense has never interpreted its Directive in this way—as the regulations at issue demonstrate. Judge Tamm pointed out in his dissent in *Huff* that a petition "can be signed either by one person or by many persons," and the context of the Directive indicates that the singular sense is intended (*id.* at 25a n.1). At all events, the Directive is no substitute for statutory language or legislative history indicating coverage of group petitioning activity.

understanding of the limited scope of 10 U.S.C. 1034 also is supported by good sense. It was reasonable for Congress to have protected communications by individual servicemen without at the same time impairing the military's authority to control group activity on military bases. An individual serviceman may communicate his personal grievances to Congress without disrupting normal base or shipboard activities. When that serviceman attempts to gather support for his grievance by circulating a petition on base, however, there is an inevitable potential that

factions will be created, morale lowered and discontent spread—with the result that the discipline and fighting capacity of the military is injured.

B. The Prior Approval Requirement Is "Necessary To The Security Of The United States" And Thus Valid Even If 10 U.S.C. 1034 Applies To The Distribution Of Petitions On Military Bases

Even if 10 U.S.C. 1034 applies to group petitioning activity on military bases, it does not invalidate regulations that are "necessary to the security of the United States." In concluding that the prior approval requirement of the challenged regulation is not "actually necessary to the national security outside of a combat zone" (Pet. App. 8a), the court of appeals did not purport to hold that a screening of petitions prior to distribution would not *contribute* to national security. Here, as in *Huff* (see 78-599 Pet. App. 16a), the court accepted the explanation of military authorities that screening such petitions would promote order and discipline.[22] Moreover, the court did not dispute that military discipline and preparedness is significantly related to the security of the nation. See *Greer* v. *Spock*, *supra*, 424 U.S. at 840. Instead, the court of appeals concluded (quoting *Huff*, *supra*, 78-599 Pet. App. 16a) that "the

[22] In *Huff* the court of appeals recognized "that order and discipline might be more tightly maintained were commanders given the opportunity to screen petitions prior to their circulation * * *" (78-599 Pet. App. 16a). In this case the Ninth Circuit also conceded that "prior restraints on petitioning may promote some military objectives * * *" (Pet. App. 8a).

national security can [not] be said to require that the objective of military discipline be pursued to the exclusion of all other interests" (Pet. App. 9a). The court also relied (Pet. App. 7a) on its prior decision in *Allen* v. *Monger*, *supra*, where it concluded that the prior approval requirement is not necessary to security because "less restrictive alternatives" (78-1005 Pet. App. 11a-12a)—such as post-distribution punishment of servicemen who distribute improper petitions—are adequate to protect the valid military interests.[23]

There are two critical assumptions underlying the analysis of the court of appeals. First, that in enacting 10 U.S.C. 1034 Congress decided to tolerate activity (outside of a combat zone) that endangers military discipline, loyalty and morale, or interferes with military preparedness, in order to provide an unrestricted right to petition. Second, that military discipline, loyalty, morale and preparedness can, in any event, be maintained by punishment imposed after the distribution of improper materials. These assumptions do not withstand analysis.

1. There is no support in the legislative history of Section 1034 for the court of appeals' assumption that Congress sought to protect on-base petitioning at the expense of military discipline and preparedness. In enacting this provision, Congress did not repeal 10 U.S.C. 934, which authorizes punishment in courts martial for "all disorders and neglects to

[23] The District of Columbia Circuit relied on this same analysis in *Huff* (see 78-599 Pet. App. 17a).

the prejudice of good order and discipline in the armed forces * * *." [24] Petitioning activity on military bases that constitutes a "disorder[] * * * to the prejudice of good order and discipline" is "unlawful" and thus subject to restriction under the express terms of 10 U.S.C. 1034. The prior approval rule serves to arrest unlawful petitioning before it can occur. Moreover, it has always been recognized that military preparedness, and thus the security of the nation, depends on military loyalty, discipline and order. *E.g.*, *Greer* v. *Spock*, *supra*, 424 U.S. at 840; *Parker* v. *Levy*, *supra*, 417 U.S. at 744; *Burns* v. *Wilson*, *supra*, 346 U.S. at 140. It is difficult to imagine how a nation could defend itself without loyal and disciplined soldiers. Regulations designed to avert action on military bases or on military ships or aircraft that clearly endangers discipline, loyalty, and the effectiveness of the armed forces are therefore necessary to the national security.

The court of appeals held that only in a "combat zone" do the demands of discipline and loyalty justify regulatory restrictions on petitioning. There is no basis for so restricting the recognition of the substantial military concerns. The need to avert clear danger to military discipline and preparedness is imperative whether we are in a state of perceived peace or in a state of declared war. A missile base in North Dakota, or a strategic bomber squadron in Maine,

[24] 10 U.S.C. 934 was upheld in *Parker* v. *Levy*, *supra*, against a contention that it violated the First Amendment. See also *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974).

must be prepared today to act within minutes of receiving an alert. It is unrealistic to suggest that our nation's security does not require a prepared, loyal and disciplined fighting force outside of a combat zone. One of the most essential purposes of maintaining an effective military is to discourage other nations from initiating combat with the United States. This interest obviously cannot be achieved if discipline and readiness cannot be enforced until combat is already underway. Moreover, an effective fighting force cannot be trained on the eve of combat or during battle (Affidavit of Lt. Gen. Leslie E. Brown in *Secretary of the Navy* v. *Huff*, 78-599 Pet. App. 62a-63a):[25]

> The highest standards of mental, physical, moral discipline, and morale of all members of the Command are central to combat readiness and effectiveness. * * * These traits must be inherent in each Marine before he goes into combat and not a learning process reserved for the actual battlefield.

The court of appeals gave insufficient weight to the evaluation made by the military officials in determining whether regulatory restrictions that protect military discipline and preparedness are neces-

[25] These concerns are especially significant at a combat-ready advance base located on the periphery of our defense, such as the Guam Air Force Base or the Iwakuni Naval Air Station. See *Huff*, *supra*, 78-599 Pet. App. 27a-30a (Tamm, J., dissenting).

sary to the national securtiy.[26] See *Parker* v. *Levy*, *supra*, 417 U.S. at 758-759; *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94. The determination of the military authorities that materials that clearly endanger discipline, loyalty or morale, or interfere with the accomplishment of the military mission, should be restricted to protect our national security is based "in reasoned policy, rather than capriciousness," *Culver* v. *Secretary of the Air Force*, 559 F.2d 622, 633 (D.C. Cir. 1977) (Leventhal, J., concurring). It should not have been rejected where, as here, there is nothing to suggest that these substantial concerns are groundless.

The court of appeals simply engaged in hyperbole when it suggested that the question presented here is whether national security requires that "the objective of military discipline be pursued to the exclusion of all other interests" (Pet. App. 9a). A base commander will withhold approval of the distribution of petitions only where they present a "clear danger" to military discipline, loyalty and order. The ability

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[26] Although the reasoning of the court of appeals is not clear in this regard, it is possible that it understood 10 U.S.C. 1034 to require the military to show that a regulation is indispensable to national security to be sustained. But the requirement in 10 U.S.C. 1034 that a regulation be "necessary" to national security cannot mean that, but for the regulation, the nation soon would be conquered. No regulation could meet that standard. If Section 1034 were so construed, the statute would constitute what it purports not to be—an absolute prohibition against restraints on petitions.

of a serviceman to distribute a petition off-base, or to discuss political topics on base, is unimpaired. See note 8, *supra*. The regulatory restriction is designed to protect only the most substantial of the government's valid concerns. It does not suppress speech or exalt discipline "to the exclusion of all other interests." [27]

2. The court of appeals' assumption that punishment after the fact would prevent the distribution of unlawful communications [28] and safeguard the national security interest that underlies this regulation is unsupported. As we discussed in connection with the same "less restrictive alternative" argument concerning the constitutional contentions, the injury to national security occurs when the improper material is distributed and discipline and morale are lowered, or the military mission is threatened. A system of post-distribution sanctions cannot ensure the constant readiness of the military to take effective action in the national defense. For the reasons elaborated

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[27] DOD Dir. 1325.6 ¶ II also makes it clear that the military regulations are designed to strike a balance between "the serviceman's right of expression * * * and the national security."

[28] The distribution of petitions that prejudice discipline and good order is unlawful under 10 U.S.C. 934. See *United States* v. *Priest*, *supra*. The Navy regulation invalidated in *Secretary of the Navy* v. *Huff* also prohibits the distribution of petitions that advise or counsel insubordination or mutiny (which is unlawful under 18 U.S.C. 2387). See FMFO 5370.3 § 4(b)(3) (78-599 Pet. 4).

above (pages 33-35, *supra*), the prior approval requirement is essential to forestall the distribution of improper materials *before* they accomplish substantial harm and is thus necessary to the protection of the national security. Cf. *Greer* v. *Spock*, *supra*, 424 U.S. at 840.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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